

## **10530                      Backpay**

**10530.1                      Overview:** Backpay is the standard Board remedy whenever a violation of the Act has resulted in a loss of employment or earnings. Losses can result not only from terminations in 8(a)(3) cases, but also from unlawful actions in 8(a)(1), (3), (4), or (5) cases, as well as in 8(b)(1) and (2) cases.

The goal in determining backpay is the same in all cases. The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Backpay awards are to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation. Backpay awards do not include punitive damages nor do they include compensation for collateral losses, such as from stress or credit problems. The backpay award should leave the discriminatee compensated as though the unlawful action had not occurred.

Backpay awards also effectuate the purposes of the Act by discouraging respondents from further unfair labor practices and by assuring discriminatees that the Government is protecting their rights under the Act.

The basic method of determining backpay is also the same in all cases. Backpay is based first on the earnings a discriminatee would have had but for the unlawful action. Against this gross amount is offset the discriminatee's actual earnings from other employment that took place after the unlawful action, less the necessary expenses incurred by the discriminatee in seeking and holding interim employment. Under some circumstances, the amounts that would have been earned had the discriminatee not quit, been discharged from, or refused interim employment are deducted from gross backpay. The difference is the net backpay award. Backpay also includes other compensation, such as benefits, lost as a result of the unlawful action, and is adjusted for any net backpay award.

## **10530.2                      Definition of Backpay Terms:**

- a.    **Discriminatee:** Any employee or member who suffers economic losses as a result of an action unlawful under the Act.

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- b. **Backpay Period:** The period during which a backpay liability accrues, beginning when the unlawful action took place and ending when a valid offer of reinstatement is made or when conditions in effect prior to the unlawful action have been restored.
- c. **Gross Backpay:** What the discriminatee would have earned from employment had there been no unlawful action. Earnings include not just wages, but all other forms of compensation such as vacation pay, health and retirement benefits, bonus payments, and use of vehicles.
- d. **Interim Earnings:** Earnings of the discriminatee from other employment obtained during the backpay period.
- e. **Expenses:** Necessary expenses incurred by the discriminatee in seeking and holding interim employment—generally offset against interim earnings.
- f. **Net Backpay:** The amount owed a discriminatee by Respondent. Net backpay is generally gross backpay minus interim earnings, but may be adjusted by discriminatee expenses, other gross compensation not subject to offsetting interim earnings, and periods during the backpay period in which the discriminatee was unavailable for employment or failed to seek interim employment.

**10530.3 Compliance Officer Responsibility:** The compliance officer is responsible for determining net backpay due in all cases. To do so, the compliance officer should obtain information and supporting records from both respondent and discriminatee. Although it is important to elicit the cooperation of all parties in providing information, and various forms of assistance should be accepted, the compliance officer should not rely wholly on the parties to determine any component of backpay. Further, although the compliance officer should encourage settlement of backpay, the compliance officer should also retain the initiative, address all issues, and obtain all information required to make a backpay determination.

**10530.4 Initiation of the Backpay Investigation:** Determination of backpay should begin as soon as the Region determines that an unfair labor practice charge has merit and that backpay is among the appropriate remedies. Such a determination will support immediate settlement efforts. It will inform respondents of potential future liabilities in the absence of settlement and provide an opportunity to inform discriminatees of their

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responsibility to seek interim employment and maintain records of interim earnings. Finally, it will facilitate and expedite the formal determination of backpay that may be necessary should the case result in a Board order or judgment.

Compliance Manual section 10505 discusses points during the course of unfair labor practice proceedings when initiation of compliance action is appropriate.

Compliance Manual section 10540.2 sets forth procedures for informing discriminatees of their responsibilities.

**10531 Backpay Investigation Procedures:** Appropriate steps in investigating and determining backpay include identifying and discussing backpay issues with all parties; obtaining information and supporting records regarding wage rates, work schedules, available overtime, promotions, or other conditions relevant to determining gross backpay; obtaining information and appropriate documentation from discriminatees regarding interim earnings and availability for work; evaluating information to determine a reasonable gross backpay formula and gross backpay amounts; preparing net backpay estimates; initiating settlement negotiations; and, where necessary, formally determining backpay.

**10531.1 Review of Case Record and Background:** Information gathered and facts established during unfair labor practice proceedings should be reviewed and used as a basis for the backpay investigation. Affidavits, file memos, correspondence, position statements, and other documents may provide information on wage rates, work assignments, unit employees, significant dates, and other important information. The administrative law judge decision and Board order may establish certain facts, such as the date of a discharge or unlawful action, on which the backpay determination must be based.

**10531.2 Discussion with the Parties:** The investigation of gross backpay may begin by asking both Respondent and discriminatee how they think gross backpay should be determined and how much it should be. Both may be familiar with rates and methods of compensation, identity of comparable or replacement employees, and other issues that will be used to determine gross backpay.

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Note, however, that in eliciting information and positions, the compliance officer must impress on the parties that the Region is ultimately responsible for determining backpay and other compliance issues.

In less complex cases, and where all parties agree on relevant facts, gross backpay, as well as other backpay issues, may be determined based on representations of the parties. In cases when parties disagree on facts or when not all parties have access to full information, it will be necessary to obtain documentation to support representations.

**10531.3 Relevant Records:** In cases when documentation or records are required, they should be requested and obtained as soon as possible. In most cases, the employer's records will be the principal source of information on which to base a gross backpay determination. Board orders normally include a provision requiring respondents to preserve and make available records required by the Region for determining backpay. When necessary, there are other records that can be used for documenting employment or earnings. Main sources of information include the following:

**Timecards and work schedules** are often maintained as a basis for payroll records.

**Personnel files** often contain such information as hire and termination dates, transfers, job classification, and wage rate changes, as well as information useful in locating missing discriminatees or other witnesses.

**Payroll records.** Even small employers now often use computerized payroll services which summarize earnings in various useful ways.

**Tax records** can provide earnings documentation. Employers must issue employees a W-2 statement of annual earnings by the end of January for the previous year's earnings. Employers in most States must also file a quarterly payroll statement for unemployment tax purposes that states gross employee earnings.

**State employment department records.** Most state unemployment departments maintain records of past employment and earnings, as entitlement for unemployment benefits is based on past employment. In some States, the department may provide this information.

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**The Social Security Administration** will provide reports on earnings that can document employee earnings subject to some limitations. SSA reports generally do not show earnings for the most recent period, show earnings only on an annual basis, and may not show earnings above FICA tax limits.

To provide earnings information, the Social Security Administration requires written authorization from the person whose earnings records are requested, as well as that person's social security number. Form NLRB-4180, Authorization to Social Security Administration to Furnish Employment and Earnings Information, may be used in requesting earnings information. The discriminatee should complete and sign Form NLRB-4180, and the signed form, dated within 60 days of the date submitted by the Region, with an appropriate cover letter, should be addressed to:

Department of Health and Human Services  
Social Security Administration  
Baltimore, Maryland 21235

**Union records**, such as hiring hall dispatch records, or records of dues received when assessed on the basis of hours worked, may provide documentation of employment dates and hours.

**Trust fund records** of employer contributions and employee credit hours may also provide information hours of employment.

**10531.4 Evaluation of information.** When information has been obtained, it must be evaluated to determine a reasonable method of measuring gross backpay, actual earnings rates to apply to that method, and proper interim earnings offsets to determine net backpay.

### 10532 Gross Backpay

**10532.1 Overview:** The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period had there been no unlawful action.

Gross backpay must take into account all benefits and forms of compensation that a discriminatee would have earned from employment had there been no unlawful action. All forms of wages, including overtime, premiums, tips, bonus payments, and commissions, are to be considered in determining

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gross backpay. Health insurance, contributions to retirement plans, meal allowances, employer-provided cars or housing, or any other benefit of employment must also be considered.

Gross backpay must also be based on changes in wage rates or other compensation that take place during the backpay period.

Gross backpay is not based on an unattainable standard of certainty. Rather, a determination of gross backpay must merely be based on a reasonable method and reasonable factual conclusions. It should be easy to understand and to apply. Over the years, the Board and the courts have applied this broad standard of reasonableness to approve numerous methods of calculating gross backpay.<sup>44</sup>

All changes from the status at the time of the unlawful action are significant in selecting a gross backpay formula. A comparison of the company's records before the unfair labor practices with those during the backpay period should disclose changes in pay and hours, periods of high and low employment and earnings, shutdowns, department changes, bonus payments, etc. Based on analysis of records obtained, and the background of the case, a tentative formula should be selected. The records should then be reviewed to make sure they contain sufficient data to enable the ready preparation of a computation in accordance with the formula selected.

If the case is complex, it is advisable to test the formula in a sample computation. This will disclose deficiencies before too much time is invested in the computation.

In cases involving many backpay claimants and long backpay periods, if the Region has reason to believe that backpay issues can be resolved without a formal proceeding, an estimate of backpay may be prepared to serve as a basis for settlement. See Compliance Manual section 10564.5. In simpler cases, when computations can be speedily prepared, estimates should be avoided.

The method determined for calculating gross backpay must depend on the facts and circumstances of the particular case. Although there is no fixed method for calculating gross backpay, there are three basic methods by which it may usually be measured and which should be considered in devising a reasonable method in a particular case. These three methods are:

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<sup>44</sup> See, for example, *Am-Del-Co, Inc.*, 234 NLRB 1040, 1042 (1978).

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**Formula one:** The average hours and/or earnings of the discriminatee prior to the unlawful action.

**Formula two:** The hours and/or earnings of comparable employees.

**Formula three:** The hours and/or earnings of replacement employees.

**10532.2      Formula One: The Average Hours and/or Earnings of the Discriminatee Prior to the Unlawful Action:** Gross backpay, using this method, is a projection through the backpay period of the discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action.

*For example,* if a discriminatee earned an average of \$400 per week for the 6-month period prior to his unlawful termination, under this method gross backpay would simply be \$400 per week, or \$5200 in a 13-week calendar quarter, for the duration of the backpay period. If the discriminatee worked an average of 40 hours per week prior to the unlawful action, gross backpay would be calculated by multiplying wage rates in effect during the backpay period by 40 hours per week.

**Criteria for adopting this method:** This method is applicable when it is concluded that conditions that existed prior to the unlawful action would have continued unchanged during the backpay period. It has the advantage of being easily understood and applied. Projection of average earnings is a reasonable method when discriminatee earnings varied from day to day or even week to week, but were consistent over a longer period of time. Records of earnings from the period prior to the unlawful action should also be readily obtainable through employer payroll records, tax reports, or other sources described in Compliance Manual section 10531.3. The following circumstances should be considered in deciding whether this method is appropriate in a given case:

**The discriminatee must have been employed long enough prior to the unlawful action to establish a reliable record of average earnings.** If the discriminatee did not have sufficient employment to establish a consistent record, or if earnings were not consistent—for example, if the discriminatee was employed in a seasonal industry—this method would not be appropriate.

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Even where earnings were generally consistent, care should be taken not to calculate an average using extraordinary variations from normal earnings or schedules. For example, if normal earnings were temporarily affected by a nonrecurring event, such as an accident or a crisis requiring extra overtime, it would generally be most reasonable to exclude the extraordinary period from the calculation of the average.

### **Conditions must not have changed during the backpay period.**

If there were significant changes in the availability of work, methods of compensation, or anything that would affect hours of work or earnings, other methods may be more appropriate.

If basic work schedules did not change during the backpay period, but wage rates did, this method might be appropriate, with gross backpay calculated on the basis of a projection of the discriminatee's average work schedule from the period prior to the unlawful action and wage rates that would have been in effect during the backpay period.

In general, this method is most applicable to a short backpay period. As the backpay period becomes longer, it becomes more likely that significant changes in conditions will occur.

**Sample computation of gross backpay based on a projection of average weekly earnings:** A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on January 8, 1992. The backpay period ended on July 14, 1992, when the discriminatee declined an offer of reinstatement. All parties agreed that no wage increases were granted and no significant changes in work schedules took place during the backpay period. All agreed that a projection of the discriminatee's average earnings from the period prior to her termination would be a reasonable basis on which to determine gross backpay.

Respondent payroll records were examined to determine average earnings during the period preceding the termination. They showed that work schedules and earnings vary from week to week. The weeks of November 4, 11, and 18, as well as the weeks of December 2, 9, and 16, all appeared to be normal workweeks, for both the discriminatee and similarly placed employees.



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The week of November 25 appeared to be a short week for most employees, as were the weeks of December 23 and 30. All parties agreed that work is slow during holiday periods. These weeks were not considered in establishing the discriminatee's average hours of employment in the period prior to her termination. The week of January 6, 1992, was also excluded, as the discriminatee was terminated in the middle of it.

In other situations, a longer period for establishing average earnings might be more appropriate. In this case, all parties agreed that the November-December period was representative of the work schedule for the entire year. Thus, gross backpay was to be determined on the basis of the discriminatee's average earnings during the 6 weeks identified above. Her earnings for those weeks were:

<i>Week</i>	<i>Gross Earnings</i>
November 4	\$425.75
November 11	397.80
November 18	440.65
December 2	370.45
December 9	400.00
December 16	405.15
Total earnings:	\$2,439.80
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Average weekly earnings:	\$406.63

#### **Gross backpay computation:**

92/1 (January–March): 12 weeks, beginning January 8.

Gross backpay: 12 weeks @ \$406.63/week: \$4,879.56

92/2 (April–June): 13 weeks

Gross backpay: 13 weeks @ \$406.63/week: \$5,286.19

92/3 (July–September): 2 weeks, ending July 14.

Gross backpay: 2 weeks @ \$406.63/week: \$813.26

Note that cents may be rounded off to whole dollars.

**10532.3 Formula Two: The Hours or Earnings of Comparable Employees:** Gross backpay, using this method, is calculated on the basis of the hours or earnings of another employee, or group of employees, whose work, earnings, and other conditions of employment were comparable to those of the discriminatee both before and after the unlawful action.

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*For example*, the discriminatee is one of a number of truckdrivers working for an employer whose operations are seasonal. Available work is shared among the employees, and their average earnings are about the same, but their earnings vary substantially over time. Using this method, gross backpay would be based on the average earnings of the other truckdrivers during the backpay period.

**Criteria for adopting this method:** This method is applicable when there is an employee or group of employees whose earnings prior to the backpay period were comparable to those of the discriminatee. It is particularly applicable when there have been significant changes in conditions during the backpay period, and when it can be concluded that the discriminatee's earnings would have changed in the same manner as did those of the comparable group. When this method is based on the average earnings of a group of employees, it is also an objective basis for calculating earnings in the event there is a dispute over how large a discretionary wage increase a discriminatee would have received, or how well the discriminatee would have performed, during the backpay period.

Use of this method requires access to employer records that show work and earnings for a number of employees over a prolonged period. The following should be considered in deciding whether or not this method is appropriate in a given case:

**A comparable employee or group of employees must be identifiable.** In some situations, where work assignment is strictly by seniority or other clear rules, a single employee may be identified as comparable to the discriminatee. In that situation, gross backpay may be based on the employment and earnings of the single employee. When a discriminatee is one of a number of employees in a job classification, it is generally more appropriate to average earnings from the group to calculate gross backpay. This is especially so when there is employee turnover within the group during the backpay period.

The representative employee or employees, or substitutes, must continue in the employ of the gross employer during the entire backpay period. The group of representative employees may diminish in size during the backpay period, but this is almost inevitable in a period of significant length. The basic requirement is that the remaining members of the representative group continue to be representative in the same sense as the original group. An alternative to the dimin-

ished group is to add comparable employees to it as it decreases in size.

As in any situation in which a comparison is being made, it is important to be alert to factors that skew the comparison. If a discriminatee is compared to a single employee, did the two have comparable earnings before the unlawful action? Did anything happen during the backpay period, unique to that single employee, that would have affected his or her earnings in a way that would not have affected the discriminatee's earnings? If the comparison is with a group of employees, care must be taken to ascertain that an appropriate group is defined. Further, care must be taken to ascertain that the group does not contain employees—such as new employees, employees with unusual rates of absenteeism, or employees at different wage rates—who are not comparable and whose inclusion in the group will skew its average.

**Sample computation of gross backpay based on average earnings of comparable employees:** A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on April 1, 1990. The backpay period ended on June 30, 1992, when the discriminatee was reinstated. The respondent was a trucking firm, with about 10 drivers, including the discriminatee. The parties agreed that the drivers' earnings varied during the year, that hours had generally increased during the backpay period, and that two general wage increases were granted during the backpay period as well. The parties also agreed that available work was not assigned through any set system. Some drivers requested more overtime than others, but in general an effort was made to assign work equally. Payroll records showed that some drivers did earn more than others, but that the range of earnings was not great. In the period prior to his termination, the discriminatee had average earnings in comparison with other drivers. It was agreed that gross backpay due the discriminatee should be based on the average earnings of unit drivers during the backpay period.

Respondent payroll records provided quarterly earnings summaries for all drivers. Drivers who were hired or terminated during a quarter were excluded for purposes of determining average earnings, and the following average earnings were calculated for the backpay period:

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<i>Yr./Qtr.</i>	<i>No. of Drivers</i>	<i>Total Earnings</i>	<i>Average Earnings</i>
90/2	8	\$58,434.00	\$7,304.25
90/3	9	82,668.00	9,185.33
90/4	7	47,535.00	6,790.71
91/1	9	95,660.00	10,628.88
91/2	9	78,640.00	8,737.77
91/3	10	40,738.00	4,073.80
91/4	8	56,814.00	6,476.75
92/1	9	55,880.00	6,208.88
92/2	9	61,213.00	6,801.44

Gross backpay due the discriminatee is the average earnings of the unit drivers, as set forth in the column on the right. It reflects changes in earnings that took place from quarter to quarter during the backpay period.

**10532.4 Formula Three: The Hours and/or Earnings of Replacement Employees:** Gross backpay, using this method, is based on the earnings of another employee, or series of employees, who replaced the discriminatee during the backpay period.

*For example,* the discriminatee was terminated from the position of machine operator, and prior to the termination worked only on a particular machine. Another employee was assigned to operate that same machine during the entire backpay period. Under this method, gross backpay would be calculated using the hours or earnings of the replacement employee.

**Criteria for adopting this method:** This method is applicable when the discriminatee had a clearly defined job which was filled by identifiable individuals during the backpay period. When applicable, it is easy to understand and apply, relatively easy to document, and can be applied for long backpay periods in which changes in wages or other conditions of employment took place. The following should be considered in determining whether or not this method is applicable in a given case:

**The replacement employee must be comparable.** Although the discriminatee may have performed a specific job, and that job may have been filled by an identifiable replacement employee during the backpay period, the replacement employee may have been paid a different wage rate, may have required more or less overtime to perform the job, or may otherwise have worked under conditions not fairly comparable to those that would have been in effect for the discriminatee.

Although it may be concluded that a replacement employee worked under different conditions, performance of the replacement may still provide information on which gross backpay may be calculated. For example, gross backpay may be based on the hours worked by a replacement employee at wage rates that would have been in effect for the discriminatee. Although the replacement employee may have worked at a different rate, the total production of a replacement employee may provide a basis for determining how much work or earnings would have been available to the discriminatee.

**Sample computation of gross backpay based on hours worked by a replacement employee:** A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on October 31, 1991. The backpay period ended on May 6, 1992, when the discriminatee was reinstated. The discriminatee was the only maintenance mechanic employed by the respondent at its production facility. After her termination, the respondent hired a replacement immediately, who remained employed until the discriminatee was reinstated. The replacement was laid off on the discriminatee's reinstatement. All parties agreed that the hours of work varied for the maintenance mechanic. During the busy season, or when there was an emergency, the mechanic was expected to work substantial overtime. At other times, the mechanic was sent home early. The parties agreed that the the discriminatee would have worked the same number of hours during the backpay period as her replacement actually did.

The respondent proposed that gross backpay be based on the actual earnings of the replacement mechanic. The replacement earned only \$10 per hour, however, whereas the discriminatee was earning \$13.25 at the time of her termination. It was agreed that no wage increases were accorded by the respondent during the backpay period. It was finally agreed that gross backpay of the discriminatee would be calculated using the actual hours worked by the replacement mechanic at the discriminatee's hourly wage rate.

Respondent payroll records summarized both earnings and hours worked, regular and overtime, on a calendar quarterly basis. Using the formula, the following gross backpay was determined:

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<i>Hours of Replacement Employee</i>		
<i>Yr./Qtr.</i>	<i>Regular</i>	<i>Overtime</i>
91/4	300	25
92/1	512	34
92/2	260	55

Earnings @ \$13.25/hour regular earnings and \$19.875 overtime earnings:

<i>Yr./Qtr.</i>	<i>Regular</i>	<i>Overtime</i>	<i>Total Gross Backpay</i>
91/4	\$3,975.00	\$496.88	\$4,471.88
92/1	6,784.00	675.75	7,459.75
92/2	3,445.00	1,038.13	4,483.13

### 10533 Considerations Common to the Use of all Methods:

In a particular case, a combination of the above methods, or some other method of determining gross backpay, may be most reasonable. There are factors that should be considered under any method.

**10533.1 Comparisons Must Be Reasonable:** Gross backpay will almost always be based on some form of comparison. Comparisons must be evaluated to be certain that they are based on full information and are not unfairly skewed. All earnings, including premiums, overtime, and bonus payments, must be considered in evaluating a comparison between employees. Unusual and nonrecurring situations must also be considered. In evaluating employee earnings, first and final earnings are often based on less than a complete payroll cycle, and are thus lower than normal earnings. Appropriate adjustments must be made for such situations.

**10533.2 Use of Ratios:** When the discriminatee can be compared to another employee or group of employees, but had “pre-unlawful” action earnings that varied from the comparable employee or group, it may be appropriate to calculate gross backpay based on the earnings of the comparable employees adjusted by an appropriate ratio.<sup>45</sup>

*For example*, prior to an unlawful termination, the discriminatee consistently earned 5 percent more than the average earnings of all employees in the same job classification. Gross backpay might be reasonably calculated as 105 percent of the average earnings of the other employees during the backpay period.

<sup>45</sup> See, for example, *Downtown Toyota*, 284 NLRB 1160 (1987).

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**10533.3 Adjusting Overtime Hours:** Overtime pay is normally paid at a premium of 1-1/2 times regular wages. The appropriate adjustment must be made when overtime is used in calculating gross backpay. It is generally easier to make this adjustment by multiplying the number of overtime hours by the premium rate and then adding them to regular hours and multiplying the total number of adjusted hours by the regular hourly wage rate.

*For example,* a discriminatee had a wage rate of \$10 per hour and worked a regular week of 40 hours as well as an average of 6 hours per week of overtime. With an overtime rate of 1-1/2 times regular pay, gross backpay may be calculated by adjusting the 6 hours of overtime to 9 hours, for total weekly gross backpay of 49 hours at \$10 per hour, or \$490.

**10533.4 Absenteeism:** Under any method of calculating backpay, it may be argued that adjustments are appropriate to reflect absenteeism of either the discriminatee or of employees to whom the discriminatee is being compared. This argument may be valid and should be considered.

If a discriminatee was rarely or never absent, there should be no adjustment for absenteeism. If backpay is based on a projection of the discriminatee's earnings from the period prior to the unlawful action, those earnings should reflect the effect of absenteeism without need for further adjustment.

When backpay is based on comparison with a group of employees, the Board has approved a method of using employee hours, known as the "Twenty-four hour method," that takes into account normal absenteeism but excludes extraordinary absenteeism.<sup>46</sup> Under this method, when payroll records show that the basic workweek was 5 days, only the average hours or earnings of employees working 24 hours or more are used. When the basic workweek is 4 days, only the average hours or earnings of employees working 16 hours or more are used. When the basic workweek is 3 days or less, the average hours of all employees are used.

Other appropriate adjustments for absenteeism may be determined based on the facts or circumstances of the particular case.

**10533.5 Reduction in Available Employment:** If the gross employer's operations or employee complement were reduced during the backpay period, it may be that the discriminatee would have lost employment

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<sup>46</sup>*Hill Transportation Co.*, 102 NLRB 1015, 1021 (1953).

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and earnings even if there had been no unlawful action. Gross backpay must take into account such losses. Payroll or other employment records should establish reductions. Note, however, that if reduced operations are caused by or connected with unfair labor practices, strikes, etc., this section does not apply. See Compliance Manual section 10533.7.

When the employer has an established and objective system for employee layoffs or reductions in hours, the system should be applied to determine whether a discriminatee or group of discriminatees would have lost work. When there is no established system to effect layoffs or reductions, gross backpay should be based on an objective method, such as one of the following:

**Seniority:** Although not universal, use of seniority in layoffs and other employment actions is widespread. It is objective and easy to apply. Seniority dates are also usually easy to document. When used to determine gross backpay, all discriminatees, replacement employees, or other comparable employees may be ranked on the basis of seniority. The appropriate basis for seniority—i.e., by job classification, by department, or plantwide—must be determined using the circumstances of each case. Available work, as determined from employment records, may then be apportioned on the basis of seniority.

*For example,* there is work for only 5 employees during a week, there are 5 employees who actually worked, and, in addition, there are 10 discriminatees. To use seniority, all 15 employees should be ranked on the basis of seniority. It should be assumed that the five most senior employees, whether discriminatees or not, would have worked during that week. Gross backpay would be due only to those discriminatees among the five most senior employees.

Note that when using seniority to determine work availability for discriminatees, any employee hired after the unlawful action to replace a discriminatee will almost certainly have lower seniority than any discriminatee.

**Proportionalization:** If no method of effecting layoffs can be determined, it may be most reasonable to base gross backpay on a sharing, or proportionalization, of available employment, among discriminatees.

*For example,* five employees worked during a week, and each earned an average of \$400. There were 10 discriminatees. To use



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proportionalization, the average earnings should be divided among the 10 discriminatees. Thus, gross backpay due each of the 10 would be \$200.

It should be noted that proportionalization is only appropriate when there is more than one discriminatee. In applying it, adjustment should be made for any period in which any discriminatee is unavailable for employment.

**10533.6 Strikes and Lockouts:** When a discriminatee has been unlawfully terminated, and a strike or lockout occurs during the backpay period, gross backpay normally accrues during the period of the strike or lockout.<sup>47</sup> When a discriminatee is unlawfully terminated during a strike, backpay normally accrues from the date of the discharge.<sup>48</sup> When discriminatees have been unlawfully locked out, backpay continues to accrue even though the discriminatees declare a strike during the lockout.<sup>49</sup>

In all of these situations, the respondent bears the burden of showing that discriminatees would have refused to work during the course of the strike.

The average hours or earnings of the discriminatee or of comparable employees in a normal period may be projected through the strike or lockout period as a basis for calculating gross backpay.

**10533.7 Effects of Unfair Labor Practices on Gross Backpay Calculations:** The occurrence of an unfair labor practice may be accompanied by turmoil in the workplace, with an effect on hours and earnings of employees. If it is concluded that this has happened, earnings from this period should not be used, or should be appropriately adjusted, in calculating backpay.

*For example,* an employer unlawfully terminates a number of union sympathizers to discourage a nascent organizing campaign. A number of other employees resign in disgust. This abrupt large scale departure disrupts production. Some of the remaining employees must work extraordinary overtime in an attempt to overcome resulting bottlenecks, while other employees are temporarily laid off because no work in progress is moving into their department. Employment and earnings patterns during this period are not likely to be representative of normal operations, and may not be an accurate measure of gross backpay.

<sup>47</sup> *Hill Transportation Co.*, 102 NLRB 1015 (1953).

<sup>48</sup> *Abilities & Goodwill*, 241 NLRB 27 (1979).

<sup>49</sup> See, for example, *Somerset Shoe Co.*, 12 NLRB 1057 (1939), modified 111 F.2d 681 (1st Cir. 1940).

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**10533.8 Discriminatee Actions that End Gross Backpay:** In cases when discriminatee misconduct or other actions lead to a determination that reinstatement is not required, backpay should also be tolled. See Compliance Manual section 10528.4 for a discussion of actions that might result in ending a normal reinstatement obligation.

### 10535 Other Components of Gross Backpay

**10535.1 Overview:** Lost wages are normally the most important component of gross backpay, but all benefits of employment and forms of compensation must be considered in determining gross backpay. In determining net backpay, interim earnings are not usually deducted from nonwage benefits of employment. The following are among forms of compensation that should be considered as components of gross backpay and discussion of their treatment.

**10535.2 Medical insurance:** Discriminatees should be made whole for expenses they incurred due to the loss of medical insurance resulting from an unlawful action. Such losses usually include charges they paid for medical services that would have been reimbursed under terms of the gross employer's medical insurance plan. Also reimbursable are premiums paid by discriminatees to maintain health insurance.<sup>50</sup>

In addition to reimbursement for incurred expenses, in cases where the gross employer made contributions to a health and welfare fund that provided health insurance, the Board has also ordered the respondent to make contributions to the fund on behalf of the discriminatee for the backpay period.<sup>51</sup>

Reimbursable medical expenses are not offset by interim wage earnings in determining net backpay. Note, however, that any reimbursement paid by a medical insurance benefit obtained from interim employment will reduce expenses incurred by the discriminatee, and thus have the effect of reducing the amount of backpay due as a result of lost medical insurance.

**10535.3 Retirement Benefits:** Discriminatees should generally be made whole for lost contributions to pension funds or retirement plans. When the gross employer made contributions to a pension fund, retroactive contributions and appropriate credit should be secured. When retirement

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<sup>50</sup> See, for example, *RMC Construction*, 266 NLRB 1064 (1982).

<sup>51</sup> See, for example, *G. Zaffino & Sons, Inc.*, 289 NLRB 571, 572 (1988).

#### 10535.3–10535.4

benefits are in the form of deferred income or profit-sharing plans, appropriate contributions should be paid as well as reimbursement for lost interest.

Retirement benefits are not offset by interim wage earnings. Equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits.

*For example*, a discriminatee was unlawfully terminated from a trucking company which made contributions on her behalf to the Teamsters pension fund. Contributions and credit for the discriminatee to that fund are a component of the respondent's gross backpay liability.

The discriminatee's first interim employer had a profit-sharing plan. Contributions to that profit-sharing plan should not be offset against the gross liability to make contributions to the Teamsters pension fund.

The discriminatee next had interim employment in a grocery store. That interim employer made contributions on her behalf to the applicable union pension fund. Those contributions should not be offset against the gross liability to the Teamsters pension fund, as they do not compensate the discriminatee for credits to the Teamsters pension fund during the backpay period.

Finally, the discriminatee next obtained interim employment with a trucking company that made contributions on her behalf to the Teamsters pension fund. Those contributions provided the discriminatee with credit toward future retirement benefits identical to that which she would have received from the respondent, and thus should be offset against the respondent's gross liability to make contributions on the discriminatee's behalf to the Teamsters pension fund.

**10535.4 Insurance or Plan Benefits:** Benefits that would have been paid out under sick leave, life or injury insurance, or other employee plans during the backpay period must also be paid to the discriminatee.

*For example*, if a discriminatee becomes ill during the backpay period, gross backpay may be tolled. See Compliance Manual section 10546.2. If, however, the gross employer had a sick pay plan, or an insurance plan that paid benefits for periods of illness, such payments would be a component of gross backpay.

## **10535.4–10535.6**

Such benefits are not offset by wage earnings from interim employment. They are, however, offset by similar benefits paid as a result of interim employment.<sup>52</sup>

**10535.5      Holiday and Vacation Pay:** Paid holidays and paid vacations that a discriminatee would have received during the backpay period are part of gross backpay. Discriminatees are only entitled to backpay, however, based on lost vacation and holiday pay. Loss of paid time off is a collateral loss for which there is no compensation.

*For example,* it is determined that a discriminatee would have earned \$5200 in a quarter. It is also determined that of these earnings, \$800 would have been for a 2-week paid vacation, and \$160 would have been for two paid holidays, during which the discriminatee would not have worked. Full gross backpay is \$5200, reflecting what would have been earned in the quarter. There is no additional compensation to reflect that the discriminatee would have received paid time off for vacation and holidays from the gross employer.

Note that lower vacation or holiday pay from interim employment will affect the net backpay determination only as lower interim earnings.

Note that if a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer. See Compliance Manual section 10542.5.

Note also that if a gross employer has the practice of paying extra vacation wages instead of giving paid vacation time off, such vacation wages should be treated as part of gross backpay.

*For example,* the respondent provided no paid vacation, but on their anniversary date gave every employee 1 week's pay in addition to their regular wages. Gross backpay should be based on regular earnings as well as 1 week's pay for every discriminatee as of their anniversary date during the backpay period.

**10535.6      Tips:** Tipping is very common in bar, restaurant, and similar service industries. Tips are earnings, and must be considered in

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<sup>52</sup> See, for example, *Glen Raven Mills*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953).

## 10535.6–10535.7

determining full gross backpay. Tip earnings are, however, often difficult to document.

In recent years, the Internal Revenue Service has required employers in businesses in which tips are customary to report earnings attributable to tips on the basis of a percentage of gross sales. Because of this, employer payroll records and tax forms will often show an amount for tip earnings. It may happen, however, that the employer or discriminatee will argue that actual tip earnings were other than the amounts reported for tax purposes. Tax reports should be considered as a basis for determining tip income, but are not dispositive.

Other records, such as diary entries of tip earnings, or bank deposits, might provide documentation of actual tip earnings. Statements provided by the discriminatee and by similarly placed employees might also be a basis for determining tip earnings. Employer records of gross sales and of reported earnings can also provide a basis for comparing, projecting, and adjusting tip earnings during the backpay period. In the end, determination of tip earnings must be based on reasonable assessment of documentary evidence and credible testimony.<sup>53</sup>

**10535.7 Other Forms of Compensation:** A reasonable assessment of the value of housing, demonstration cars, meals, and other forms of compensation that the discriminatee would have received but for the unlawful action must also be included in determining gross backpay.<sup>54</sup>

<sup>53</sup> See, for example, *Hacienda Hotel & Casino*, 279 NLRB 601 (1986); and *Original Oyster House*, 281 NLRB 1153 (1986). Note that in both of these cases, because it found that the discriminatees had higher tip income than they had reported for income tax purposes, the Board submitted to the Internal Revenue Service a copy of its Supplemental Decision and Order.

<sup>54</sup> Examples of the variety of payments included in gross backpay are: *Underwood Machinery Co.*, 95 NLRB 1386, 1403 (1951) (promotions); *Peyton Packing Co.*, 129 NLRB 1275, 1276 (1961); *Indianapolis Wire-Bound Box Co.*, 89 NLRB 617, 642, 650 (1950) (loss resulting from discriminatory eviction); *McCarthy-Bernhardt Buick*, 103 NLRB 1475, 1488 (1953); *C. Pappas Co.*, 82 NLRB 765, 767, 796 (1949) (commission increases); *Phoenix Mutual Life Insurance Co.*, 73 NLRB 1463, 1466 (1947) (commissions and renewals); *Stanton Enterprises*, 147 NLRB 693, 699 (1964), *enfd.* 351 F.2d 261 (4th Cir. 1965); *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960) (tips); *Hickman Garment Co.*, 196 NLRB 428, 429 fn. 2 (1962), *enfd.* 471 F.2d 611 (6th Cir. 1972) (Christmas bonus); *Aerosonic Instrument Corp.*, 128 NLRB 412, 414 (1960) (incentive bonus); *Dinion Coil Co.*, 96 NLRB 1435, 1461 (1951), *enfd.* 201 F.2d 484 (2d Cir. 1952) (holiday pay); *Nabors v. NLRB*, 323 F.2d 686, 689–690 (5th Cir. 1963), *enfd.* in relevant part 134 NLRB 1078, 1085–1087 (1961), *cert. denied* 376 U.S. 911 (1964) (profit-sharing bonus); *International Trailer Co.*, 150 NLRB 1205, 1210, 1211 (1965) (incentive and leadership bonus); *Golay & Co.*, 184 NLRB 241, 242–243, 247 (1970), *enfd.* 447 F.2d 290, 294–295 (7th Cir. 1971) (wage increases, vacation pay, and insured medical expenses); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1126–1129 (1965), *enfd.* in relevant part 365 F.2d 888, 892 (D.C. Cir. 1966) (pension contributions); *Madison Courier*, 180 NLRB 781, Appendix A at 795 fn. (1970), *remanded on other grounds* 472 F.2d 1307 (D.C. Cir. 1972) (insurance premiums and Christmas bonus); *Tennessee Packers*, 160 NLRB 1496, 1501 (1966) (sick); *Ellis & Watts Products*, 143 NLRB 1269, 1270 (1963), *enfd.* 344 F.2d 67 (6th Cir. 1965) (overtime); *Brown & Root*, 132 NLRB 486, 491 (1961), *enfd.* in relevant part 311 F.2d 447 (8th Cir. 1963) (shift differential); *Heinrich Motors*, 166 NLRB 783, 786 (1967), *enfd.* 403 F.2d 145 (2d Cir. 1968) (vacation pay); *Miami Coca-Cola Bottling Co.*, 151 NLRB

Continued

## 10535.7–10536

Such benefits are not normally subject to offsets from interim wage earnings.

**10536 Gross Backpay When a Union is a Respondent:** Union backpay liabilities may arise from various situations, including causing an employer to terminate a discriminatee for unlawful reasons or unlawfully operating an exclusive hiring hall. Although the union is not the employer, the method of calculating gross backpay is the same as in all other cases. That is, gross backpay is calculated on the basis of what employment the discriminatee would have had had the unlawful action not taken place.

*For example,* if a union caused an employer to terminate a discriminatee, gross backpay will be based on what employment the discriminatee would have had with the employer but for the termination.

If a union unlawfully failed to dispatch a discriminatee from its hiring hall, gross backpay will be based on what employment and earnings would have resulted from that dispatch.

Because the gross employer may not be a respondent in these cases, there may not be access to employer employment and earnings records. Compliance Manual section 10531.3 suggests other sources of obtaining information needed to determine backpay. In addition, with clearance from the Division of Operations Management, it may be appropriate to seek gross employer records through use of an investigative subpoena. See Compliance Manual sections 10590.2 and 10601.2.

Hiring hall records should provide information concerning what employees did receive dispatches and to what employers. Union benefit fund reports might serve to document actual employment of comparable employees during the backpay period.

In addition, because the union is not the employer, it cannot end the backpay period itself by offering reinstatement. In some circumstances, such as when there is also an unfair labor practice proceeding against the employer, the union may toll its backpay liability by notifying the

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1701, 1713 (1965), enfd. in relevant part 360 F.2d 569, 572–573 (5th Cir. 1966) (safety awards); *L. J. Williams Lumber Co.*, 93 NLRB 1672, 1676, 1691 (1951), enfd. 195 F.2d 669, 672–673 (4th Cir. 1952), cert. denied 344 U.S. 834 (payments for transporting employees to plant); *Taylor Mfg. Co.*, 83 NLRB 142, 144 (1949) (Veterans Administration payments under G.I. program); *Raymond Pearson, Inc.*, 115 NLRB 190, 192, 210 (1956), enfd. denied on other grounds 243 F.2d 456 (5th Cir. 1957) (employer ordered to pay to deceased discriminatee's estate any losses suffered with regard to bonuses, emoluments, insurance converge, and other benefits accorded to employees by employer and which discriminatee would have enjoyed but for discharge); *Texas Co.*, 42 NLRB 593, 609 (1942), enfd. 135 F.2d 562 (9th Cir. 1943) (room and board); *Delorean Cadillac*, 231 NLRB 329 (1977) (reimbursement for loss of use of company demonstrator car).

## 10536–10540.2

employer and the discriminatees in writing that it has no objection to their reinstatement.<sup>55</sup> When there are unfair labor practice proceedings against both union and employer, primary liability may be against either, depending on the circumstances of the dispute.<sup>56</sup>

When the union is solely liable for backpay, the Board has found that backpay should not be tolled until the discriminatee is either reinstated by the employer or until the discriminatee obtains substantially equivalent employment elsewhere.<sup>57</sup>

### 10540 Interim Earnings

**10540.1 Overview:** All compensation earned by a discriminatee subsequent to the unlawful action—that is, during the backpay period—must be considered as interim earnings. Generally, interim earnings are deducted from gross backpay in determining the net backpay due a discriminatee. There are, however, exceptions, as discussed in the following sections.

The compliance officer will fully investigate interim earnings, determine all issues involving proper treatment of interim earnings, and make appropriate offsets against gross backpay to calculate net backpay. Full investigation of interim earnings issues is necessary to secure settlement of or voluntary compliance with backpay requirements in unfair labor practice cases, as well as to prepare for a compliance hearing, should such a proceeding be necessary.

In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action.<sup>58</sup>

**10540.2 Maintaining Contact with Discriminatees:** The discriminatee is the fundamental source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. It is of utmost importance that contact be maintained with discriminatees throughout the course of unfair labor practice proceedings.

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<sup>55</sup> See, for example, *C. B. Display Service*, 260 NLRB 1102 (1982); and *Port Jefferson Nursing Home*, 251 NLRB 716 (1980).

<sup>56</sup> See, for example, *Q.V.L. Construction*, 260 NLRB 1096 (1982); *Hendrickson Bros.*, 299 NLRB 442 (1990); *Exxon Co.*, 253 NLRB 213 (1980); and *Zoe Chemical Co.*, 160 NLRB 1001 (1966).

<sup>57</sup> See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981); *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564, 567–568 (1981).

<sup>58</sup> See, for example *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962).

### **10540.2–10540.3**

The compliance officer should establish contact with discriminatees as soon as possible after the Regional Office has determined that a violation has occurred that might result in a make-whole remedy, both to begin collecting information needed to determine backpay and to advise the discriminatee of his or her responsibilities.

Early determination of net backpay liabilities supports early settlement efforts. In cases that do not settle, later compliance proceedings are facilitated when discriminatees have been advised at the outset to maintain contact with the Region, have been advised of their responsibility to seek interim employment—see Compliance Manual section 10545—and have been advised to maintain records of their efforts to obtain interim employment and of their earnings from interim employment.

To maintain contact and to provide appropriate information, the following NLRB forms should be sent to all identified discriminatees at the time the Region issues complaint or administratively determines that a charge has merit:

#### **NLRB-916. Backpay Claimant Identification**

#### **NLRB-4180. Authorization to Social Security Administration to Furnish Employment and Earnings Information**

#### **NLRB-4288. Information on Backpay for Employees**

#### **NLRB-4685. Notification of Change of Address**

#### **NLRB-5224. Claimant Expense and Search for Work Report**

In addition, see Unfair Labor Practice Proceedings Manual section 10269.

**10540.3 Interviewing Discriminatees:** At appropriate times in the course of compliance proceedings, all discriminatees should be interviewed either in person or by telephone to review and update information concerning availability for employment, efforts to obtain interim employment, earnings from interim employment, and expenses incurred in seeking and holding interim employment. Discriminatees must identify all interim employment and earnings. To address issues concerning their responsibility to seek interim employment and their availability for interim employment—see Compliance Manual sections 10545 and 10546—discriminatees should also explain periods of low earnings and unemployment.



## **10540.3–10540.5**

The result of the discriminatee interview should be a complete account of his activities during the backpay period and identification of all issues concerning interim earnings and availability for employment.

**10540.4 Documentation:** The compliance officer should obtain documentation of interim earnings whenever appropriate. The most common form of documentation of interim earnings will be payslips or other earnings reports from the interim employer. Discriminatees should cooperate in providing such documentation.

Former interim employers may be approached to obtain appropriate documentation, although without discriminatee authorization many employers will not release employment information.

Appendix 2 sets forth a pattern letter that may be used for requesting earnings information from an interim employer.

It may be inappropriate to approach current interim employers for earnings information because communications from the compliance officer could adversely affect the discriminatee's current employment relationship. Thus, the compliance officer should consult with the discriminatee regarding that relationship before going to the interim employer for earnings information.

In those situations where interim employer records are not available, Compliance Manual section 10531.3 sets forth sources that may be used to document earnings.

Note also that a discriminatee's failure to cooperate in the investigation and documentation of interim earnings may indicate an effort to conceal interim earnings. See Compliance Manual section 10540.5, immediately following.

**10540.5 Discriminatee Concealment of Interim Earnings:** In most cases, the discriminatee interview and submission of supporting earnings documentation should resolve interim earnings issues. When a respondent challenges the completeness of a discriminatee account, the compliance officer should investigate on the basis of respondent suggestions.

When the Region is satisfied that a complete account of interim employment and earnings has been obtained, it should so advise the parties. The respondent then assumes the burden of establishing additional interim earnings. See Compliance Manual section 10540.1.

### **10540.5–10541.3**

In cases where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment.<sup>59</sup>

#### **10541 Interim Earnings That Require Special Consideration:**

In most situations, interim earnings will be based on an hourly wage or a set salary, and total interim earnings will be easily summarized and offset against gross backpay. Some forms of earnings and compensation do require special consideration. Examples include the following:

**10541.1 Earnings in Addition to Base Wages or Salary:** Premiums, tips, bonus payments, awards, holiday and vacation pay, and similar forms of compensation are earnings. In determining net backpay, they should be treated by the same methods used in determining gross backpay, and included with regular interim earnings. See Compliance Manual sections 10532.1 and 10535.4–10535.7.

Note, however, that Compliance Manual sections 10542.2–10542.5 discuss situations in which interim earnings are not deducted from gross backpay.

**10541.2 “Under-the-Table” Earnings:** Any compensation paid for providing service is a form of earnings, regardless of whether it has been properly reported for income tax purposes. Cash or under-the-table earnings obtained during the backpay period should be treated like any other interim earnings.

**10541.3 Self-Employment:** A discriminatee’s decision to engage in self-employment should not be regarded as a failure to seek interim employment. In general, self-employment should be regarded as a reasonable effort to mitigate losses. See Compliance Manual section 10545.

Net earnings from self-employment during the backpay period should be offset against gross backpay.

The compliance officer may face problems in determining net earnings from self-employment. In general, net earnings are the difference between gross receipts and offsetting expenses. Income statements and other records kept for a business by an outside accountant are generally the best means of determining net earnings. If the discriminatee did not use an outside accountant, his or her business records may be the only documentation of earnings available. Federal tax returns may also establish net earnings

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<sup>59</sup> See *American Navigation*, 268 NLRB 426 (1983); *C. R. Adams Trucking*, 272 NLRB 1271, 1276 (1984); and *Ad Art*, 280 NLRB 985, fn. 2 (1986).

## 10541.3–10541.5

from self-employment. Internal Revenue Schedule C is the form used to report net earnings from self-employment, and requires reporting of gross receipts as well as offsetting expenses approved by IRS.

Tax returns are not dispositive of net earnings from self-employment. For example, it may be shown that tax returns were not properly prepared, or that expenses claimed against net earnings for tax purposes were in fact some form of compensation to the discriminatee.

Note, in addition, that when a substantial source of revenue for a self-employed discriminatee is the discriminatee's invested capital in the business, then some adjustment of the income from the business should be made to apportion earnings between the part resulting from their invested capital and that from services. The usual method of doing this is to deduct the interest that would have been paid by the discriminatee to a willing lender of the investment capital, and not the conventional legal interest.

As in other aspects of the backpay investigation, the goal in determining net income from self-employment is to reach reasonable conclusions as to actual earnings based on the facts and circumstances presented.<sup>60</sup>

**10541.4 Medical and Retirement Benefits:** A medical insurance plan or contributions to a retirement fund are not normally treated as interim earnings and offset against gross backpay. Note also that although these benefits are considered components of gross backpay, they are not normally subjected to offsets from wages earned in interim employment. Health insurance and retirement contributions earned through interim employment may, however, be offset against equivalent benefits that are components of gross backpay. See Compliance Manual sections 10535.2 and 10535.3.

**10541.5 Other Nonwage Compensation:** The reasonable value of other forms of compensation, such as employer-provided housing, cars, or meal allowances, should be treated as interim earnings and offset against gross backpay.<sup>61</sup>

Note that nonwage forms of compensation, when part of gross backpay, are not normally offset by wages earned in interim employment. See Compliance Manual section 10535.

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<sup>60</sup> See, for example, *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980).

<sup>61</sup> See, for example, *Empire Worsted Mills*, 53 NLRB 683, 692 (1943).

## 10541.5–10542.2

Note also that when a discriminatee obtains a shorter paid vacation from interim employment than he or she would have received from the respondent or gross employer, it is appropriate to reduce interim earnings by the amount earned during the period that would have been a paid vacation with the respondent or gross employer.<sup>62</sup>

In some circumstances, it is not appropriate to deduct such nonwage compensation from gross backpay. For example, where an interim employee provides employee housing, but such is required because the work is in a remote location, the housing may have no real value, or be equivalent to an expense the discriminatee would have had to incur in order to obtain the interim employment.

**10542 Earnings and Income Not Deductible from Gross Backpay:** Although in general, interim earnings are offset against gross backpay, there are exceptions, discussed in the following sections. Further, unearned income is generally not offset against gross backpay.

**10542.1 Unearned Income and Collateral Benefits Not Deductible:** Unearned income is income derived from any source other than an employment relationship. Collateral benefits are any form of assistance not based on employment or a return of service by the recipient. Unearned income and collateral benefits can include interest earnings from stock or savings, gifts or loans where no work or service is expected in return, most forms of public assistance, and most forms of insurance payments.<sup>63</sup>

Unemployment insurance payments are collateral benefits; as such, they are not interim earnings, and are not offset against gross backpay.<sup>64</sup>

Strike benefits are collateral benefits if they are given without condition. If a union requires a discriminatee to perform strike duty or some other form of service as a condition for receiving strike benefits, the strike benefits are earnings and offset against gross backpay.<sup>65</sup>

**10542.2 Earnings During Periods Excepted from Gross Backpay Not Deductible:** When it has been determined that there is no gross backpay liability during some period within the backpay period, interim

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<sup>62</sup> See *Heinrich Motors*, 166 NLRB 783, 786 fn. 28 (1967).

<sup>63</sup> See *Medline Industries*, 261 NLRB 1329, 1337 (1982), for a discussion of collateral benefits.

<sup>64</sup> *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951).

<sup>65</sup> See, for example, *Lundy Packing Co.*, 286 NLRB 141 fn. 2 (1987), *enfd.* 856 F.2d 627 (4th Cir. 1988).

## 10542.2–10542.3

earnings earned during the same period should not be offset against any gross backpay.<sup>66</sup>

*For example*, it is established that the respondent shut its operation down for 4 weeks during the backpay period. As a result, there is no gross backpay liability during that 4-week period. Any interim earnings that the discriminatee earned during that period should not be offset against gross backpay determined due during other parts of the backpay period. Care must be taken to determine what interim earnings were actually earned during such excepted periods.

**10542.3 Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible:** In cases when a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay.<sup>67</sup>

This situation is most likely to occur when a discriminatee worked more overtime hours for an interim employer than would have been available with the gross employer, but is applicable in any situation.

*For example*, it is determined that gross backpay is based on a wage rate of \$10 per hour and a regular workweek of 40 hours, or \$400 per week. Total interim earnings for the same period are \$440 per week, but are based on a regular hourly wage rate of \$8, a regular workweek of 40 hours, and 10 hours of overtime per week. Although full interim earnings exceed gross backpay, in this situation it is not appropriate to offset the interim earning derived from overtime against gross backpay. Thus, only interim earnings from the regular 40-hour workweek, or \$320, should be offset against gross backpay.

Similarly, if it is determined that gross backpay is based on a reduced workweek of 30 hours, only those earnings derived from the first 30 hours of interim employment should be offset against gross backpay.

Note that net backpay is determined on the basis of calendar quarters. See Compliance Manual sections 10550.2 and 10550.3. Consistent with

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<sup>66</sup> See, for example, *San Juan Mercantile Corp.*, 135 NLRB 698, 699 (1962).

<sup>67</sup> See, for example, *United Aircraft Corp.*, 204 NLRB 1068, 1073–1074 (1973); and *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989).

### 10542.3–10542.5

this policy, excess interim hours must also be allocated to calendar quarters and compared with gross hours only within the same quarter.

**10542.4 Supplemental Employment or Moonlighting:** When a discriminatee holds two separate jobs simultaneously during the backpay period, income from the second job is generally not deductible against gross backpay.

If the discriminatee held a second job before the unlawful action, and continued to hold that job through the backpay period, earnings from the second job are not deductible.<sup>68</sup> This principle applies even if the supplemental employment is not continuous or is with different employers.

*For example*, a discriminatee worked as a musician during evening hours prior to the unlawful action. He continues this part-time work during the backpay period, working as a musician for different employers. These earnings are not offset against gross backpay.

If the discriminatee had no second job before the unlawful action, but during the backpay period holds either two full-time jobs or one full-time job plus an additional part-time job, only the earnings from one full-time job should be deducted. This is consistent with the principle that interim earnings based on hours in excess of those available at the gross employer are not deductible. See Compliance Manual section 10542.3.

If the discriminatee held a second job prior to the unlawful action, and then increased the hours of employment at that job during the backpay period, earnings derived from the increase in hours are deductible interim earnings.<sup>69</sup>

*For example*, prior to his unlawful termination, the discriminatee did carpentry work on weekends. During the backpay period, he does this work throughout the week. Earnings from the additional hours of work beyond those the discriminatee normally worked prior to the termination should be treated as deductible interim earnings.

**10542.5 Interim Earnings During Periods That Would Have Been Paid Vacation Periods Under the Gross Employer:** If a discriminatee receives less paid vacation from an interim employer than

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<sup>68</sup> See, for example, *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952); and *U.S. Telefactores Corp.*, 300 NLRB 720, 722 (1990).

<sup>69</sup> See, for example, *Golay & Co.*, 184 NLRB 241, 245 (1970).

## 10542.5–10544

he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer.<sup>70</sup>

**10544 Expenses Deductible from Interim Earnings:** Expenses incurred by a discriminatee in seeking or maintaining interim employment are deducted from interim earnings, thus reducing the amount of interim earnings offset against gross backpay.<sup>71</sup> Such expenses include expenses that would not have been incurred during the course of gross employment, such as increased transportation costs in seeking or commuting to interim employment, the cost of tools or uniforms required by an interim employer, room and board when working away from home, or the cost of moving if required to assume interim employment.

Expenses are only deducted from interim earnings. They are not added to gross backpay. Thus, when there have been no interim earnings, expenses incurred in seeking interim employment have no effect on net backpay, which would be based on gross backpay without any offset. Note that expenses incurred in seeking or holding interim employment should be allocated to calendar quarters. See Compliance Manual sections 10550.2 and 10550.3.

*For example*, the discriminatee obtains interim employment, but the interim employer is located 20 miles farther from her home than the gross employer. Mileage for the additional drive should be deducted from earnings at the interim employer before offsetting those interim earnings against gross backpay, by using the mileage rate in effect at the time to compensate Federal employees for their use of private automobiles while on Government business.

Deductible expenses may be determined on the discriminatee's account and reasonable conclusions. Early contact with the discriminatee can avoid later problems in documenting expenses by advising the discriminatee of the importance of keeping appropriate records. It may also be appropriate to require documentation of some expenses.

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<sup>70</sup> See *Heinrich Motors*, 166 NLRB 783, 792–793 (1967), *enfd.* 403 F.2d 145 (2d Cir. 1968); and *Central Freight Lines*, 266 NLRB 182, 183 (1983).

<sup>71</sup> See, for example, *Nelson Metal Fabricating*, 259 NLRB 1023 (1982), and *UARCO, Inc.*, 294 NLRB 96, 102 (1989).

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Note that in a compliance hearing the Region bears the burden of proving expenses that will be offset against interim earnings. See Compliance Manual section 10621.4.

Note also that evidence of expenses incurred in seeking interim employment may also serve to establish the discriminatee's effort to mitigate losses. See Compliance Manual section 10545.